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No. 07-1362

IN THE

Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government acknowledges that the courts of appeals are deeply divided on the question whether a district court may order a federal sentence to be served consecutively with a state sentence that has yet to be imposed. The Government also makes no attempt to defend that pratice on the merits. The Government nonetheless argues that the Court should never review this persistent conflict, and it should never correct this unlawful practice, because that practice has no "practical effect" on the administration of justice. The Government further argues that the practice has no practical effect in this case.

The Government's arguments for opposing review are wholly unpersuasive. These orders place an illegitimate obstacle in the path of defendants seeking a concurrent state sentence; they promote unseemly gamesmanship between state and federal authorities; they imperil state sentencing objectives; and they denigrate federal judicial power. And petitioner himself remains subject to the impermissible effects of the order issued in this case because it prejudices his opportunity to obtain a concurrent sentence from the state court.

The Government points to the law in the circuits that sanction this practice as a basis for concluding that nothing serious is amiss. But a review of those decisions only confirms the pressing need for review. According to those decisions, the challenged sentencing orders may or may not be binding on state courts; they may or may not be binding on the Bureau of Prisons ("BOP"); and even if the orders are binding on state courts, those courts can defy them

and get away with it. Some decisions even suggest that BOP has the raw power to defy both the state and federal courts and impose its own sentencing scheme. To allow this practice to continue is to celebrate chaos. It also promotes intolerable sentencing disparities and makes a mockery of the comity this Court has long called for in the sentencing context. This Court should grant the petition and put an end to this persistently troublesome and wholly illegitimate practice.[1]

ARGUMENT

1. The Government acknowledges that the courts of appeals have divided, 4-4, on the question presented by this case: whether a federal district court has the authority to direct that a sentence be served consecutively with a yet-to-be-imposed state sentence. Opp. 4. There is no question that this entrenched division in the circuits, like the satellite litigation it has spawned, *see* Pet. 17, will persist unless and until this Court grants review.[2]

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[1] As the Government explains, the Court has denied certiorari on this issue on a number of occasions. In those cases, however, there was either a case-specific reason for the denial, or the petition did not expose the inadequacy of the Government's reasons for opposing review.

[2] As the Government notes, one of the circuits holding that courts have no authority to issue a sentence that is consecutive with a yet-to-be imposed state sentence has also held that the last two sentences of 18 U.S.C. § 3584(a) make the sentence automatically consecutive. *Romandine v. United States*, 206 F.3d 731, 737-38 (7th Cir. 2000). That holding is no more defensible on the merits than the holding that courts have authority to issue such orders, *see* Pet. 9-10, and the Government does not suggest otherwise. Moreover, as the Government ac-

2. The Government is notably unwilling to defend the merits of the district court's decision to make its sentence consecutive with a state sentence that has not been imposed. When confronted with (1) the plain text of 18 U.S.C. § 3584(a); (2) the requirement of reasoned sentencing imposed by 18 U.S.C. § 3584(b); (3) the general principle that Congress is not presumed to encroach on significant state interests unless it has made its intent to do so "unmistakably clear," *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); (4) the legislative history of the statute; and (5) its own recent failing, in a departure from usual practice, to offer any defense of the rule adopted below (Pet. 7-14, 19), the Government's opposition is conspicuously silent. That silence speaks volumes. It is only fair to conclude at this point that the Government is unwilling to defend this practice on the merits, because it believes that this practice cannot be defended. Indeed, it cannot: petitioner's sentence is, by any measure, wholly unauthorized.

3. The Government nonetheless argues that resolution of the conflict presented by this case is "unnecessary" because "the adoption of one legal rule or the other has little if any practical effect" on the ad-

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knowledges, that Seventh Circuit holding has been squarely rejected by two other circuits. *See* Opp. 5 n.1 (citing cases from the Second and Sixth Circuits). Because the meaning of last two sentences of § 3584(a) is squarely it issue here, Pet. 9-10, the resolution of the question in this case will likely resolve the conflict created by the Seventh Circuit's decision as well. In any event, the 4-4 conflict at issue here warrants review on its own terms, even if the Court's resolution of it does not squarely reject the Seventh Circuit's aberrational and indefensible ruling.

ministration of justice generally or "on petitioner." Opp. 6, 10-11. The Government is incorrect. The practice at issue in this case has subjected countless defendants to illegal sentences, wreaked havoc on the spirit of comity that should govern federal-state sentencing relations, and treated the federal judiciary as a powerless advisory tribunal. Contrary to the Government's claim, the "practical effect" of the sentences challenged here (Opp. 6) is another reason to grant the petition, not a reason to deny it.

a. It would seem virtually undeniable that a district court "order" that a future state sentence is to be consecutive with the federal sentence places a serious obstacle in the path of a defendant who seeks a concurrent sentence in state court. The Government's sole response is that state courts *might* not view such "orders" as "binding," and therefore *might* fail to follow them. But the Government simply fails to explain why a state court would view as nonbinding a federal court "order" that is facially applicable and formally directs that any state sentence is to be served consecutively with the federal sentence.

The most the Government can offer is that *one circuit* has taken the view that such orders are not binding on state courts. Opp. 8 (citing *United States v. Andrews*, 330 F.3d 1305, 1306-07 (11th Cir.) (per curiam), *cert. denied*, 540 U.S. 1003 (2003)). That is hardly a sufficient basis for the Government's speculation that state courts will not view federal court sentencing orders as binding, particularly when *other circuits have made it absolutely clear that the orders are binding on state courts. See United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*,

516 U.S. 926 (1995); *United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001) (per curiam).

Equally important, even if the state courts do not view the orders as legally binding, the Government offers no reason why state courts will not feel impelled to comply with them solely for reasons of comity. This Court has often emphasized the fundamental role comity plays in the relationship between state and federal courts. *E.g.*, *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922). In the end, the Government cannot reasonably dispute that, at the very least, a federal court order that a state sentence is to be served consecutively with a yet-to-be-imposed state sentence places a defendant at a severe disadvantage when he seeks a concurrent sentence from a state court.

b. Moreover, to the extent that some state courts try to circumvent these illegitimate orders, the result is to create a spirit of gamesmanship rather than cooperation between state and federal courts. The Government does not deny this effect, but actually celebrates it. If a state court wishes to defy or circumvent the federal court's order, the Government insists, all the State has to do is to "designat[e] the defendant's federal institution for service of the state sentence . . . or make the state sentence effectively concurrent . . . by adjusting the length of the state sentence." Opp. 8-9. The Government does not explain, however, how such subterfuge can be reconciled with this Court's call for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in sentencing. *Ponzi*, 258 U.S. at 259.

Surprisingly, the Government not only condones the gamesmanship between federal and state courts; it invites another player – BOP – into the game. According to the Government, the way the game works is that a federal court issues a consecutive sentence order hoping that a state court will be seduced into complying with it; the state court then does what it can to make the sentence effectively concurrent; and then BOP circumvents the state court order either by refusing to credit the defendant for time served on the state sentence or refusing to allow the defendant to serve his state time in federal prison. Opp. 9. Such machinations could not be further from the "spirit of reciprocal comity and mutual assistance" this Court has emphasized.

c. Furthermore, the Government does not deny that the maneuvering it would require imperils a state court's ability to achieve legitimate sentencing objectives. *See* Opp. 9. Nor could it. The options that the Government proposes simply will not work when state law imposes a mandatory minimum sentence, or when a state court judge is required to give a slap on the wrist for a serious offense in order to make its sentence effectively concurrent, or when the federal sentence is subsequently reduced because the defendant has cooperated with federal authorities. *See* Pet. 21-22.

The Government contends that such unacceptable consequences can be ignored because petitioner's approach also "would not entirely solve" the problem. Opp. 9. This is so, says the Government, because BOP can simply decide to frustrate the state's concurrent sentence by refusing to credit a defendant for time served or by refusing to accept

the defendant into federal custody. *Id.* That a problem cannot be *entirely* solved is certainly no reason not to solve almost all of it. In any event, once this Court solves the biggest problem, BOP has it within its control to solve the rest of it, and it almost certainly will. Congress has made clear that it believes that the second sentencing court is in the best position to determine whether a sentence should be concurrent or consecutive. *See* Pet. 7-14. And this Court has made clear that BOP should be guided by principles of comity in responding to legitimate state sentencing decisions. *Ponzi*, 258 U.S. at 259. Once this Court's decision in this case establishes the first point and reiterates the second, BOP will presumably respect the sentencing choices of the state court when that court is the second to impose sentence, regardless whether BOP in theory has the raw power to do something else.

d. The Government also fails to explain how treating federal court *orders* as mere suggestions to be declined at will can possibly be reconciled with the requirements of Article III. *See* Pet. 22-23 (discussing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)). The most the Government can muster is that the orders "may" be binding on BOP, even if they are not binding on state courts. Opp. 6. Ultimately, however, the Government appears to take the position that the federal orders are not even binding on BOP, *see* Opp. 9 (citing *United States v. Wilson*, 503 U.S. 329 (1992)), and that they instead amount to nothing more than "recommendations" to that agency, *id.* at 7 (citing *United States v. Hayes*, 535 F.3d 907, 910 (8th Cir. 2008)).

If the orders are not binding on state courts and are not binding on BOP, it is difficult to understand how they can be anything other than illegitimate advisory opinions. Regardless whether these orders fall outside the scope of Article III, however, it clearly denigrates federal judicial power for a federal court to issue an order that everyone in the federal and state criminal justice system is free to ignore.

e. The Government contends that the circuit decisions sanctioning sentences that are consecutive with future state sentences demonstrate that this pervasive unlawful practice has no adverse effect on the criminal justice system. *See* Opp. 6-8. A review of those decisions belies the Government's claim and reinforces the need for review.

The rules in the Eleventh Circuit are these: first, a district court is free to issue an order making the sentence consecutive. Then the state court is free to ignore that order and impose a concurrent sentence. And then BOP is required to comply with the federal court order and make the sentence consecutive again. *Andrews*, 330 F.3d at 1307 & n.1.

In the Fifth Circuit, a federal court may "forbid its sentence from being served concurrently." *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir.), *cert. denied*, 500 U.S. 925 (1991). According to dicta in another case on a different issue, however, *Brown* "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently." *United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008). The Fifth Circuit has yet to explain how a federal-court order can "forbid" a sen-

tence from being served consecutively, and yet not be binding enough to forbid any such thing.

In the Tenth Circuit, the district court can issue a consecutive sentencing order that the "state court cannot override." *Williams*, 46 F.3d at 58. A state court, however, may attempt to defy the federal court order by issuing a concurrent sentence anyway. *Id.* It is then unclear whether BOP is required to circumvent the state court order and comply with the federal order, or whether BOP is free to decide for itself whether the sentence should be concurrent or consecutive.

In the Eighth Circuit, a district court consecutive sentence order "controls" the state court. *Mayotte*, 249 F.3d at 799. But it serves only as a as a "recommendation" to BOP, which ultimately may decide for itself whether a sentence will be concurrent or consecutive. *Hayes*, 535 F.3d at 909-11.

These decisions do not, as the Government suggests, demonstrate that the system is working. They demonstrate the opposite: there is undeniable chaos in the federal system that requires this Court's immediate intervention.

f. Finally, the Government argues that review in this case is unwarranted because "petitioner's federal term of imprisonment will likely expire before the resolution" of the state charges pending against him, and "petitioner cannot claim harm from the court's order that his federal sentence be served consecutively to the North Carolina charge if he is released before the State sentences him." Opp. 10-11. The Government further argues that a decision by this Court vacating the consecutive sentence order

would not provide any benefit to petitioner. *Id.* These arguments are unexplained and inexplicable.

If petitioner completes his federal sentence before North Carolina tries petitioner on his outstanding charges, he will still be subject to an outstanding, facially binding, district court *order* requiring that petitioner's federal sentence be consecutive with any sentence imposed in the North Carolina case. *See* Pet. App. 4a-5a. That order will continue to have the same prejudicial effect it has had on petitioner from the beginning: it prejudices petitioner's opportunity to obtain a concurrent sentence from the state court if and when he is tried and convicted of the outstanding charges against him. At that point, the state court sentencing petitioner will be presented with a federal court order requiring petitioner's state sentence to be consecutive rather than concurrent.

To the extent that the Government's point is that the state court could ignore the order and impose a concurrent sentence, that is just a rehash of the Government's general argument to that effect, and it is unpersuasive for the same reason. If the order is viewed as binding by the state court, petitioner will be foreclosed from even seeking a concurrent sentence. But even if it is not viewed as binding, it is still entitled to comity, and that places petitioner at a serious disadvantage in obtaining a concurrent sentence. Petitioner is entitled to have that impermissible obstacle to obtaining a concurrent sentence removed. And that is no less true once petitioner is released from federal custody than it is today.

By the same token, an order by this Court vacating the district court consecutive sentence order will provide petitioner with complete relief. At that point, petitioner will be in a position to seek a concurrent sentence from the state court without that request being prejudiced by an illegitimate federal court consecutive sentence order.

* * *

The Government acknowledges the existence of an entrenched circuit split and refuses to defend the merits of the sentencing practice employed by the district court in this case. Its only argument against review – that the practice of imposing federal sentences consecutive with future state sentences has no "practical effect" – is demonstrably wrong. The system as it stands subjects countless defendants, including petitioner, to inequitable sentencing disparities, and it pits federal courts, state courts, and BOP against one another in a constant struggle that undermines comity in sentencing and respect for federal judicial power. This Court should grant review and put this illegitimate practice to an end.[3]

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[3] Counsel in this case intends to file, by September 30, petitions seeking review in two other cases that present the same question. Those petitions involve defendants whose anticipated release dates are July 11, 2009, and August 1, 2009. The Court may wish to hold the present petition so that it can act on all three petitions at once.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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